

Who Decides Res Judicata and Collateral Estoppel in Arbitration?

Judge Abraham J. Gafni (Ret.)

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ADR

Litigating parties recognize that both res judicata (claim preclusion) and collateral estoppel (issue preclusion) apply not only to court decisions but to those of an arbitrator as well.

But what if following the judicial confirmation of an arbitration award, the losing party brings a second arbitration claim? The party successful in the first arbitration believes, however, that the new proceeding raises claims or issues that were resolved in the first arbitration. Who decides whether claim or issue preclusion should apply—the court that confirmed the initial award or the arbitrator appointed for the second arbitration?

The U.S. Court of Appeals for the Second Circuit considered this issue recently and concluded that in the ordinary course, it would be for the arbitrator to decide whether a claim or issue should be precluded, in *Citigroup v. Abu Dhabi Investment Authority* (USCA, 2d Circuit, January 14, 2015).

The dispute originated out of an investment by Abu Dhabi Investment Authority in Citigroup Inc. ADIA claimed that Citigroup had engaged, inter alia, in fraud. Their agreement provided for resolving any dispute through arbitration. Following arbitration, the arbitrators rejected ADIA's claim.

The federal district court confirmed the arbitrators' decision. ADIA then commenced a new arbitration proceeding against Citigroup alleging, inter alia, breach of contract. Citigroup sought to enjoin this

second arbitration by instituting a separate action in the federal court contending that these new issues were barred by claim preclusion as they were or could have been raised in the first arbitration. It contended that an injunction was warranted under the federal All Writs Act and the district court's "inherent authority to protect its proceedings and judgments" (the confirmed arbitration award).

ADIA moved to dismiss Citigroup's action, asserting that under the parties' agreement, all disputes, including those relating to preclusion, must be resolved in the second arbitration and not by the federal court that had confirmed the earlier arbitration award.

In its opinion, the appellate court reviewed general principles relating to the allocation of decision-making responsibility between court and arbitrator.

First, the court noted the policy favoring arbitration so that "most disputes between parties to a binding arbitration agreement are 'arbitrable' meaning that they are to be decided by arbitrators, not the courts." Doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Courts, however, should generally decide "questions of arbitrability" such as whether the parties are bound by the arbitration clause, or the dispute involves a controversy within the scope of an admittedly binding arbitration agreement.

Preclusion was not viewed by the court as presenting a question of arbitrability "because it, like other affirmative defenses such as time limits and laches, was a legal defense to the opposing party's claims and, as such, is 'itself a component of the dispute on the merits.'"

Citigroup contended, however, that this should not apply when the arbitrators are being called upon to consider the preclusive effect of a prior federal order, here the confirmation of the earlier arbitration award. It contended that allowing arbitrators to decide this issue would inappropriately impact the integrity of federal judgments if parties could relitigate in arbitration the claims previously resolved by a federal court. In support of this position it cited several cases and referenced the federal All Writs Act, which authorizes a federal court to issue commands necessary to effectuate or prevent the frustration of federal orders previously issued.

The court of appeals disagreed, pointing out a "significant difference" in the cases cited by Citigroup. In particular, it noted that the district courts in those cases had actually addressed the merits of the underlying claims in some respect. Underlying the holdings in those cases was the notion that "the district court that resolved the merits of a case is in the best position to protect its judgment because

it is the most familiar with what it considered and decided in the proceeding leading to that judgment."

The court distinguished those circumstances from the typical confirmation of an arbitration award "which ordinarily is 'a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.'" The second arbitrator, in ruling on preclusion, would not be re-deciding matters actually considered by the district court when it confirmed the arbitrator's decision. Thus, in this case involving Citigroup, "the district court did not review the merits of any of ADIA's substantive claims or the context in which those claims arose. Instead it considered only whether the arbitration panel's evidentiary rulings and application of New York choice of law principles violated the [Federal Arbitration Act]."

Otherwise stated, the court of appeals concluded that in confirming an award, "a district court unfamiliar with the underlying circumstances, transactions and claims, is not the best interpreter of what was decided in the arbitration proceedings, the results of which it merely confirmed." Accordingly, there would be "no reason why that [judgment] should give the federal court the exclusive power to determine the preclusive effect of the arbitration."

The court also noted the potential for an anomalous "hierarchy of judgments" should it agree that to protect the integrity of federal judgments under the All Writs Act, preclusion must be decided by a federal court that had merely confirmed the arbitration award. This would result because the preclusion resulting from awards confirmed by state courts (to which federal courts would be required to give full faith and credit) would always be decided by arbitrators whereas preclusion resulting from federal confirmation awards would be decided by the federal courts.

In short, the court specifically limited its holding, stating that "when the prior federal judgment merely confirmed an arbitration award through a limited procedure that did not involve consideration of the merits of the underlying claims, the FAA's framework of favoring the submission of disputes to arbitration and our precedents in cases addressing comparable issues preclude a district court from using the All Writs Act to enjoin a subsequent arbitration of claims that one party asserts are barred by the prior arbitration." As the confirmation procedure in the *Citigroup* case did not involve consideration of the underlying merits of the claim, there was no justification for empowering the district court and barring the second arbitrator from ruling on claim or issue preclusion.

But would the Second Circuit have so held had the district court, in some respect, been involved in considering the merits of the case and, presumably, would have greater knowledge of the factors

underlying the earlier decision? Would it then allow Citigroup to seek preclusion from the court under the All Writs Act notwithstanding a binding arbitration agreement? Or, would it simply state that it is still for the second arbitrator to consider earlier decisions of the courts or arbitrators in determining whether claim or issue preclusion should apply?

The appellate court specifically leaves this question open. As to holdings by other courts that federal courts should decide preclusion in circumstances where they had been involved in a consideration of the merits, the Second Circuit simply stated, "We need not and do not consider whether we agree with this justification because it is simply absent from this case."

However, this opinion does highlight certain principles that should be considered when considering arbitration:

- The doctrines of claim and issue preclusion are applicable to the award of an arbitrator.
- If a second arbitration is begun, it will generally be the second arbitrator who will decide the preclusive effect of a prior arbitration award, even though that earlier award has been confirmed by a court.
- It is possible that courts will differ on whether the arbitrator may decide claim or issue preclusion issues when the court in some respect had earlier considered the actual merits of the case.

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